AMERICAN CONSTITUTION SOCIETY'S CONSTANCE BAKER MOTLEY NATIONAL STUDENT WRITING COMPETITION WINNER

SURVEILLING SPEECH AND ASSOCIATION: NSA SURVEILLANCE PROGRAMS AND THE FIRST AMENDMENT

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"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peacably to assemble, and to petition the Government for a redress of grievances."

First Amendment to the United States Constitution

"For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution, and the most cherished of those ideals have found expression in the First Amendment. It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties—the freedom of association—which makes the defense of the Nation worthwhile."

United States v. Robel, 389 U.S. 258, 264 (1967)

INTRODUCTION

Americans have brought numerous legal challenges to mass electronic surveillance programs conducted by the National Security Agency ("NSA"). These challenges have largely focused on the statutory basis for the programs and their legality under the Fourth Amendment.[1] In addition, however, some plaintiffs have alleged that

* J.D., Harvard Law School, Class of 2016. Many thanks to Susan Crawford, Andy Sellars, Patrick Toomey, and Brian Sparks.

1 Katherine J. Strandburg, *Membership Lists, Metadata, and Freedom of Association's Specificity Requirement*, 10 I/S: J. L. & POL'Y FOR INFO. SOC'Y 327 (2014).

the programs infringe on their First Amendment rights.[2] The government, in defending one NSA program, argued that a program that is consistent with the Fourth Amendment necessarily satisfies the First Amendment.[3] This Article seeks to demonstrate that this interpretation does not adequately protect Americans' constitutional rights to the freedom of speech and association. Therefore, the Article argues, a court evaluating the legality of the NSA's mass surveillance programs must conduct an independent First Amendment analysis.

In analyzing government acts that implicate First Amendment rights, courts use "exacting" or "strict" scrutiny,[4] the highest standard of judicial review, which requires that the government action be "adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms."[5] Thus, the government may not restrict First Amendment rights except by a program or action that is a) based upon a compelling government need, b) effective in fulfilling that need, and c) not overbroad.

Existing First Amendment law is driven by three principles that both support this conclusion and provide a framework for analyzing mass surveillance programs. First, the government cannot seek to know with whom Americans associate, absent a compelling need. Second, the First Amendment prevents the government from acting in a way that deters political and associational activity. Third, the First Amendment requires that government programs be narrow in scope, such that the government must tailor its programs to meet specific objectives. Current surveillance programs violate all three principles. Mass electronic surveillance gathers associational information, in most cases absent a compelling need. The surveillance programs in question demonstrably have a chilling effect on First Amendment activity. Finally, bulk, indiscriminate collection does not pass the test of being narrow in scope and tailored to specific objectives.[6] For these reasons, at least some of the NSA surveillance programs likely violate the First Amendment.

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2 *ACLU v. Clapper—Challenge to NSA Mass Call-tracking Program*, ACLU (Oct. 29, 2015), https://www.aclu.org/cases/aclu-v-clapper-challenge-nsa-mass-call-tracking-program.

3 ACLU v. Clapper, 959 F. Supp. 2d 724, 753 (S.D.N.Y. 2013), *vacated in part*, 785 F.3d 787 (2015).

4 United States v. Alvarez, 132 S. Ct. 2537, 2548 (2012).

5 Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

6 For an argument that mass surveillance violates specificity requirements implied by the First Amendment, see Strandburg, *supra* note 1.

Following discussion of the above, this Article focuses on one specific program, allegedly authorized under Section 215 of the Patriot Act, by which the NSA engaged in the bulk collection of telephony metadata. Though the Section 215 program expired June 1, 2015[7] (and the USA FREEDOM Act limits any attempt to reinstate the program[8]), its operation raised important First Amendment issues that have not been adequately addressed and that are implicated by other mass surveillance programs. The Article argues that the Section 215 program fails to satisfy the First Amendment because it is neither appropriately tailored nor effective at achieving a compelling government interest. Though this Article focuses on Section 215, this analysis should be applied to other mass surveillance programs.

This Article proceeds in three parts. Because the First Amendment analysis requires an understanding of the government activity in question, Part I provides factual information about the NSA programs. Part II argues that when considering the legality of the programs, courts must conduct an independent First Amendment analysis. Part III discusses the test for legality under the First Amendment, explores three driving principles of First Amendment jurisprudence, and applies these principles to the Section 215 program.

I. FACTUAL BACKGROUND: MASS SURVEILLANCE PROGRAMS CONDUCTED BY THE NATIONAL SECURITY AGENCY

Beginning in 2001, the NSA developed and implemented a large-scale program to collect digital information concerning Americans' telephone communications. The program was kept secret from the public until former NSA contractor and whistleblower Edward Snowden revealed its existence in 2013. Known as the Section 215 program, it was based on a provision in the Foreign Intelligence Surveillance Act that allows the Federal Bureau of Investigation to obtain companies' "business records."[9] The Patriot Act of 2001 expanded this authority, and the NSA used it to obtain massive quantities of in-

7 Mark Jaycox & Dia Kayyali, *Section 215 Expires—For Now*, ELECTRONIC FRONTIER FOUNDATION (May 31, 2015), https://www.eff.org/deeplinks/2015/05/section-215-expires-now

8 Sabrina Siddiqui, *Congress Passes NSA Surveillance Reform in Vindication for Snowden*, THE GUARDIAN (June 3, 2015), http://www.theguardian.com/us-news/2015/jun/02/congress-surveillance-reform-edward-snowden.

9 PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE TELEPHONE RECORDS PROGRAM CONDUCTED UNDER SECTION 215 OF THE USA PATRIOT ACT AND ON THE OPERATIONS OF THE FOREIGN INTELLIGENCE SURVEILLANCE COURT 21–22 (2014), *available at* http://www.pclob.gov/Library/215Report_on_the _Telephone_Records_Program-2.pdf (hereinafter "PCLOB Section 215 Report").

formation about Americans' communications from telephone companies.[10] The Section 215 program was initially intended to be a short-term response to the September 11 terrorist attacks, but eventually became a "'permanent surveillance tool.'"[11] In 2006, the secret Foreign Intelligence Surveillance Court ("FISC") ruled that Section 215 of the Patriot Act (as amended in 2005) authorized the government collection of all "call detail records."[12] These records consist of "metadata," which includes the phone number of each caller, the date and time of each call, the length of each call, whether or not the call was connected, calling card numbers, and the trunk identifier and routing information (which can include location).[13] This information was collected in bulk and stored in a database.[14] Under continuously renewed orders from the FISC, telephone companies were required to provide call records to the NSA on an ongoing basis.[15]

Once this collection occurred, NSA staff analyzed the data in accordance with certain procedures. An analyst (or an automated program)[16] conducted a "query" of the database, which means a search for a specific identifier, such as a phone number or other selection term.[17] This allowed the NSA to link a suspect's phone number to other numbers, and to develop "chains" of contacts.[18] This process could reveal links between individuals, bring new individuals under suspicion, and allow for the monitoring of communications between individuals.[19] Initially, the program's "three hop" policy allowed analysts to query any phone number that was connected to a suspect's number by up to three degrees of separation. That is, given a suspect's number, the NSA could search for the records of any phone number connected to the first number, any number connected to the second number, and any number connected to the third number.[20]

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10 *Id.*

11 *Id.* at 37.

12 Clapper, 959 F. Supp. 2d at 732.

13 Doug Aamoth, *Verizon, Telephony Metadata, the National Security Agency, and You*, TIME (June 6, 2013), http://techland.time.com/2013/06/06/verizon-telephony-metadata-the-national-security-agency-and-you/.

14 PCLOB Section 215 Report, *supra* note 9, at 25.

15 *Id.* at 46.

16 *Id.* at 30.

17 *Id.* at 26.

18 *Id.*

19 *Id.* at 27.

20 Fred Kaplan, *Pretty Good Privacy: The Three Ambitious NSA Reforms Endorsed by Obama, and the One He Rejected*, SLATE.COM (Jan. 17, 2014, 4:01 PM), http://www.slate.com/articles/news_and_politics/war_stories/2014/01/obama_s_nsa_reforms_the_president_s_proposals_for_metadata_and_the_fisa.html.

President Obama modified this to two "hops" after the program's existence was made public.[21] Records that were flagged as the result of a query are stored in a separate database. These records could be analyzed and used for a broad range of intelligence purposes, including sharing and cooperation with other agencies.[22] The NSA's use of this data may have included social network mapping[23] and sharing with other governments.[24]

There were two primary limitations on the querying of data. First, analysts needed a "reasonable, articulable suspicion" that the selector term was associated with a terrorist organization.[25] This could be based on information provided by another government agency, making it easier for the analyst to develop a reasonable, articulable suspicion.[26] Second, with respect to selection terms that an analyst reasonably believed were used by a U.S. person,[27] the reasonable articulable suspicion could not be based solely on activities protected by the First Amendment.[28] Once information was in the separate database of material that was flagged as the result of a query, no reasonable articulable suspicion was required to conduct further analysis.[29]

The NSA was previously required to destroy telephony metadata after five years.[30] However, if a record was flagged as the result of a query, it could be stored for a longer period of time.[31] It is unclear how much data was retained through this procedure. In November 2015, the Office of the Director of National Intelligence stated that

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21 *Id.*

22 PCLOB SECTION 215 REPORT, *supra* note 9, at 29.

23 James Risen & Laura Poitras, *N.S.A. Gathers Data on Social Connections of U.S. Citizens*, N.Y. TIMES (Sept. 28, 2013), http://www.nytimes.com/2013/09/29/us/nsa-examines-social-networks-of-us-citizens.html .

24 Andrea Germanos, *British Spy Agency: We Don't Need a Warrant for Americans' Data. We Have "Arrangements,"* COMMONDREAMS.ORG (Oct. 29, 2014), http://www.commondreams.org/news/2014/10/29/british-spy-agency-we-dont-need-warrant-americans-data-we-have-arrangements.

25 PCLOB SECTION 215 REPORT, *supra* note 9, at 27.

26 *Id.* at 28.

27 According to the NSA, a U.S. person is a citizen of the United States, an alien lawfully admitted for permanent residence, an unincorporated association with a substantial number of members who are citizens of the U.S. or aliens lawfully admitted for permanent residence, or a corporation that is incorporated in the U.S. *SIGINT Frequently Asked Questions*, NATIONAL SECURITY AGENCY & CENTRAL SECURITY SERVICE, https://www.nsa.gov/sig int/faqs.shtml#sigint4 (last visited Dec. 14, 2014).

28 PCLOB SECTION 215 REPORT, *supra* note 9, at 28.

29 *Id.* at 30.

30 Dan Roberts & Spencer Ackerman, *US Intelligence Outlines Checks It Says Validate Surveillance*, THE GUARDIAN (June 15, 2013), http://www.theguardian.com/world/2013/jun/16/nsa-the-nsa-files.

31 PCLOB SECTION 215 REPORT, *supra* note 9, at 25.

the NSA would maintain the database until civil litigation regarding the program is resolved, though it will not use or access the information for any purpose unrelated to the litigation.[32]

This Article focuses on Section 215 because relatively more information is available about this program than about other programs. However, the Section 215 program is only part of the vast surveillance apparatus built by the NSA. Another program collects the content of some communications.[33] Other programs may collect location data[34] or Internet metadata.[35] Many aspects of government surveillance programs remain secret. Even given the limited information available, however, it is possible to analyze First Amendment problems raised by NSA mass surveillance. This Article will not address the possible collection of content, location data, or Internet metadata, other than to argue that any such collection likely raises concerns sufficient to warrant an independent First Amendment analysis.

II. COURTS MUST CONDUCT AN INDEPENDENT FIRST AMENDMENT ANALYSIS OF THE NSA PROGRAMS

The purpose of the First Amendment is substantively different from that of the Fourth Amendment. As a result, the amendments provide zones of protection that are not coextensive. Litigation challenging NSA surveillance to date has primarily focused on the Fourth Amendment, which protects the privacy rights of American citizens by requiring that the government obtain a valid warrant before con-

32 Press Release, Office of the Director of National Intelligence, ODNI Announces Transition to New Telephone Metadata Program (Nov. 27, 2015), *available at* http://www.dni.gov/index.php/newsroom/press-releases/210-press-releases-2015/1292-odni-announces-transition-to-new-telephone-metadata-program; *see also In re* Application of F.B.I., No. BR 14-96, 2014 WL 5463290 at *3 (FISA Ct. June 19, 2014) (allowing the government to retain bulk telephony metadata "for the sole purpose of meeting preservation obligations in civil litigation pending against it").

33 *See, e.g.*, PRIVACY & CIVIL LIBERTIES OVERSIGHT BD., REPORT ON THE SURVEILLANCE PROGRAM OPERATED PURSUANT TO SECTION 702 OF THE FOREIGN INTELLIGENCE SURVEILLANCE ACT 19–20 (2014), *available at* http://www.pclob.gov/Libary/702-Report-2.pdf (discussing the surveillance program that collects intelligence on the the communication between U.S. persons and "foreign targets" abroad).

34 Ellen Nakashima, *NSA Had Test Project to Collect Data on Americans' Cellphone Locations, Director Says*, WASH. POST (Oct. 2, 2013), http://www.washingtonpost.com/world/national-security/nsa-had-test-project-to-collect-data-on-americans-cellphone-locations-director-says/2013/10/02/65076278-2b71-11e3-8ade-alf23cda135e-_story.html..

35 Charlie Savage, *Reagan-Era Order on Surveillance Violates Rights, Says Departing Aide*, N.Y. TIMES (Aug. 13, 2014), http://www.nytimes.com/2014/08/14/us/politics/reagan-era-order-on-surveillance-violates-rights-says-departing-aide.html?_r=0..

ducting a search or seizure of property.[36] The warrant requirement applies anywhere that citizens have a reasonable expectation of privacy.[37] An electronic intrusion can qualify as a violation, as long as the expectation of privacy is reasonable.[38] Much of the media attention and public discussion regarding the constitutionality of NSA programs has centered on this question of privacy,[39] and it is likely that at least some of the NSA programs violate the Fourth Amendment. Notwithstanding the result of the Fourth Amendment analysis, however, courts confronting modern mass surveillance programs should complete a separate First Amendment analysis as well.

As the Supreme Court noted in 1972, cases concerning national security and government surveillance "often reflect a convergence of First and Fourth Amendment values not present in cases of 'ordinary' crime."[40] In some situations, the First Amendment may be more protective than the Fourth Amendment. For example, much of the NSA litigation has centered on the extent to which the Fourth Amendment protection is weakened when customers disclose their information to cell phone service providers. This principle, known as the third party doctrine, was established in *Smith v. Maryland*.[41] In this 1979 case, the Court declared that the government's monitoring of phone calls made by a single robbery suspect for a period of three days, through a device installed by the telephone company, was not a search.[42] *Smith*'s application to the NSA mass surveillance programs has been criticized,[43] and courts have begun to push back against the

36 *See* Mincey v. Arizona, 437 U.S. 385, 390 (1978) ("[S]earches conducted outside of the judicial process, without prior approval by a judge or magistrate are *per se* unreasonable under the Fourth Amendment . . . .").

37 *See* Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring) (finding that the Fourth Amendment affords protection to individuals when they have exhibited an actual (subjective) expectation to privacy and when society recognizes that expectation as reasonable).

38 *Id.* at 362 (Harlan, J., concurring) ("[R]easonable expectations of privacy may be defeated by electronic as well as physical invasion.").

39 *See, e.g.*, John Villasenor, *What You Need to Know about the Third-Party Doctrine*, THE ATLANTIC (Dec. 30, 2013), http://www.theatlantic.com/technology/archive/2013/12/what-you-need-to-know-about-the-third-party-doctrine/28 2721/.

40 United States v. U.S. Dist. Court for E. Dist. of Mich, 407 U.S. 297, 313 (1972).

41 *See* Smith v. Maryland, 442 U.S. 735, 743–44 (1979) (finding that a person has no legitimate expectation of privacy in the information she voluntarily turns over to third parties).

42 *See id.* at 745–46 (holding that the petitioner did not have a reasonable expectation to privacy in the phone numbers he dialed, and thus, the use of a pen register was not a search).

43 Jim Harper, *If You Think* Smith v. Maryland *Permits Mass Surveillance, You Haven't Read* Smith v. Maryland, CATO AT LIBERTY (Aug. 20, 2013, 1:04 PM), http://www.cato.org/blog/you-think-smith-v-maryland-permits-mass-surveillance-you-havent-read-smith-v-maryland.

third party doctrine to find expectations of privacy even in information exposed to others.[44] Regardless of the outcome of the Fourth Amendment analysis, however, mass surveillance programs separately implicate the First Amendment.

The First Amendment and Fourth Amendment protect different rights and serve different purposes. The Fourth Amendment protects privacy, primarily benefitting the individual whose privacy is at issue.[45] By contrast, the First Amendment protects the rights to association and expression. Though the First Amendment benefits individuals,[46] it also benefits society as a whole by ensuring the freedom of political activity that is necessary for a functioning democracy.[47] The First Amendment protects ideas and dissent in a way that the Fourth Amendment does not, and this protection is of fundamental importance for a free and democratic society.[48]

The Fourth Amendment is based on the idea that there is a zone in which citizens' privacy is protected. The text of the Amendment identifies this zone as citizen's "persons, houses, papers, and effects."[49] It has been interpreted to include public places where there is a reasonable expectation of privacy, such as phone booths.[50] The Fourth Amendment guarantee of privacy is critical, but political and social engagement also depend upon citizens' willingness to associate with others. Even if the privacy of every American were protected consistent with the Fourth Amendment, this would not be enough to ensure political and associational freedom. Protected speech and as-

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44 *See, e.g.*, United States v. Jones, 132 S. Ct. 945, 957 (2012) (Sotomayor, J., concurring) (declaring that "it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties," as such an approach is ill-suited to the digital age); United States v. Warshak, 631 F.3d 266, 274 (6th Cir. 2010) (finding a reasonable expectation of privacy in emails that were disclosed to an Internet Service Provider); United States v. Davis, 754 F.3d 1205, 1217 (11th Cir. 2014) (holding that "cell site location information is within a subscriber's reasonable expectation of privacy" even though the information is available to the cell service provider).

45 Eric Lardiere, *The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 UCLA L. REV. 976, 1029–30 (1983).

46 *See* Griswold v. Connecticut, 381 U.S. 479, 483 (1965) ("[T]he First Amendment has a penumbra where privacy is protected from governmental intrusion.").

47 Lardiere, *supra* note 45, at 1030–31.

48 *See* Nat'l Ass'n for Advancement of Colored People v. Button, 371 U.S. 415, 431 (1963) (citing Sweezy v. New Hampshire, 354 U.S. 234, 250–51 (1957)) (discussing how the freedom of speech is necessary to promote political ideas, especially those supported by "minority, dissident groups").

49 U.S. CONST. amend. IV.

50 *See* Katz, 389 U.S. at 353 ("[E]lectronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth. . . .").

sociation are not necessarily conducted in places or through methods in which individuals have a reasonable expectation of privacy. In fact, to be effective, political and other expressive activity may sometimes need to occur in zones that are not private. Furthermore, as mentioned, First Amendment claims are unlike Fourth Amendment claims in that the former are not weakened by disclosure to a third party.[51] The protections of the First Amendment are therefore different from, and in some ways broader than, the protections of the Fourth Amendment.

Nevertheless, there is disagreement over whether courts must analyze both the First and Fourth Amendments when considering the constitutionality of government surveillance programs.[52] The few courts to address the issue of whether the First and Fourth Amendments are coextensive have reached different conclusions. In *ACLU v. Clapper*, a case concerning the Section 215 program, the government argued that surveillance that does not violate the Fourth Amendment is necessarily consistent with the First Amendment, "even though [the surveillance] may be directed at communicative or associative activities."[53] The district court judge found this argument to be convincing, though he did not explicitly rule on the issue of whether a First Amendment violation is possible in the absence of a Fourth Amendment violation. Instead, the judge concluded that the Section 215 program did not substantially burden the plaintiffs' First Amendment rights.[54] In doing so, he rejected the American Civil Liberties Union ("ACLU")'s argument that the Section 215 program likely has a chilling effect because it deters people from contacting the ACLU who would otherwise do so. The argument that the two Amendments provide coextensive zones of protection, and Judge William Pauley's favorable reception of this position, ignore the First Amendment's promises of freedom of speech and association.

Other courts have recognized that the differences between the First and Fourth Amendment require courts to undertake a separate

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51 *See In re* First Nat. Bank, Englewood, Colo., 701 F.2d 115, 118 (10th Cir. 1983) (recounting that the Supreme Court has acknowledged that individuals still retain their First Amendment right to association, even where the governmental action is directed at third parties).

52 *See* Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 795 (2008) ("One way to deal with this conundrum might be to view the Fourth Amendment through a special First Amendment lens in cases implicating expressive activity.").

53 Clapper, 959 F. Supp. 2d at 753.

54 *See id.* at 753–54 ("[B]ulk metadata collection does not burden First Amendment rights substantially.").

analysis for each Amendment. For example, in *Tabbaa*, plaintiffs challenged a government policy that targeted Americans who traveled abroad to attend conferences about Islam.[55] This policy authorized border agents to detain and interrogate attendees as they crossed back into the United States.[56] In its 2007 decision, the Second Circuit analyzed the policy under the Fourth Amendment and—separately—under the First Amendment.[57] The court specifically noted that it was required to conduct these separate analyses, stating that "distinguishing between incidental and substantial burdens under the First Amendment requires a different analysis, applying different legal standards, than distinguishing what is and is not routine in the Fourth Amendment border context."[58] In another case, the Second Circuit subjected a subpoena to compel the disclosure of information to separate First Amendment scrutiny, and ultimately narrowed the subpoena as a result of this First Amendment analysis.[59] In *Ealy*, the Fifth Circuit similarly held that the First Amendment could limit the power of a grand jury.[60] All of these decisions were based on the principle that the First and Fourth Amendments protect different rights and act in different ways. Courts should apply this principle to mass surveillance programs, and consider the two Amendments separately.

In contrast with the courts in the above cases, some courts have expressly found that they are only required to complete a Fourth Amendment analysis, and even suggested that this analysis is sufficient to protect First Amendment interests. These decisions state that if a search satisfies the Fourth Amendment, no independent inquiry under the First Amendment is required. This position ignores the particular protections provided by the First Amendment. Furthermore, these decisions do not mean that courts can decline to conduct a First Amendment analysis in considering challenges to the NSA programs.

For example, in *Zurcher v. Stanford Daily*, police searched the office of a university newspaper for photographs of a demonstration that

55 Tabbaa v. Chertoff, 509 F.3d 89, 92 (2d Cir. 2007).

56 *Id.*

57 *Id.* at 102 n.4.

58 *Id.*

59 *See* Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. Waterfront Comm'n of New York Harbor, 667 F.2d 267, 274 (2d Cir. 1981) (limiting the required disclosure so as to reduce the impairment of the longshoremen's First Amendment rights).

60 *See* Ealy v. Littlejohn, 569 F.2d 219, 227 (5th Cir. 1978) ("[T]he First Amendment can serve as a limitation on the power of the grand jury to interfere with a witness' freedoms of association and expression.").

had occurred on the campus.[61] The newspaper challenged the search under the First and Fourth Amendments.[62] The Supreme Court, reversing the Ninth Circuit, found that the search was permissible.[63] In rejecting the plaintiffs' First Amendment challenge, the Court stated that the First Amendment does not require a special showing for the issuance of a warrant to search for evidence reasonably believed to be on a newspaper's premises.[64] The Court indicated that even when First Amendment interests are implicated, proper application of the Fourth Amendment is sufficient to protect those interests.[65] However, the Court did say that when First Amendment interests are implicated, the Fourth Amendment warrant requirements must be applied with "particular exactitude."[66] In response to *Zurcher*, Congress passed the Privacy Protection Act, which makes it illegal for law enforcement to search and seize journalists' work product materials.[67]

The outcome in *Zurcher* does not mean that a court can choose not to conduct an independent First Amendment analysis with respect to the NSA programs. The First Amendment interest at issue in *Zurcher* was the freedom of the press, not the freedom of speech or of association. Though journalists are certainly chilled by surveillance, the implications of the NSA programs for the freedoms of speech and association are far broader than the chilling effect of the targeted search in *Zurcher*, which concerned a specific investigation that was conducted pursuant to the issuance of a warrant based on probable cause. This situation is in no way similar to the bulk collection of most Americans' telephony metadata, which raises independent First Amendment concerns unlike the situation that faced the plaintiffs in *Zurcher*.[68] Thus, the fact that the *Zurcher* court did not find it necessary to engage in a separate First Amendment analysis does not suggest that other courts should omit this analysis when evaluating mass surveillance programs.

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61 Zurcher v. Stanford Daily, 436 U.S. 547, 551 (1978).

62 *Id.* at 552.

63 *Id.* at 567–68.

64 *Id.* at 565.

65 *Id.* ("[T]he prior cases do no more than insist that the courts apply the warrant requirements with particular exactitude when First Amendment interests would be endangered by the search.").

66 *Id.*

67 *See generally The Privacy Protection Act of 1980*, EPIC.ORG, https://epic.org/privacy/ppa/ .

68 Caitlin Thistle, Note, *A First Amendment Breach: The National Security Agency's Electronic Surveillance Program*, 38 SETON HALL L. REV. 1197, 1228 (2008) ("*Reporters Committee for Freedom of Press v. AT&T Co.* raised concerns that prevented the court from recognizing First Amendment rights independent of the Fourth Amendment. These concerns would not exist in the context of NSA surveillance as demonstrated by *ACLU v. NSA*.").

However, *Zurcher* is not the only case to state this position. In *Reporters Committee for Freedom of the Press v. American Telephone and Telegraph Co.*, the D.C. Circuit found that a telephone company could provide the phone billing records of investigative journalists to law enforcement agents.[69] Citing the recent *Zurcher* decision, the court stated, "the guarantees of the Fourth and Fifth Amendments achieve their purpose and provide every individual with sufficient protection against good faith investigative action for the full enjoyment of his First Amendment rights of expression."[70] The holding in *Reporters Committee* is limited to the context of a "good faith investigation."[71] In addition, the court was motivated by fear of a "slippery slope" scenario in which journalists, or any individual subject to an investigation, would claim that their First Amendment rights were implicated by that investigation.[72] This scenario would force courts to determine that the First Amendment interests of some people were more important than those of other people.[73] This concern is less salient with respect to mass surveillance programs that collect information about most Americans.

Finally, in *Jabara v. Kelley,* the plaintiff, a member of several Arab organizations, was investigated by the NSA and the FBI.[74] The court held that the plaintiff's Fourth Amendment rights were not violated, and that it did not need to conduct separate First Amendment analysis. Citing *Reporters Committee,* the court stated that "the First Amendment and Fourth Amendment provide coextensive zones of privacy in the context of a good faith criminal investigation" and extended this reasoning to cover "good faith national security investigations which are not strictly criminal in nature."[75] Again, this holding is limited to the context of a good faith investigation. It does not apply to broad surveillance programs such as those run by the NSA, which are entirely different from the specific investigations at issue in *Zurcher, Reporters Committee,* and *Jabara.*

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69 593 F.2d 1030 (D.C. Cir. 1978).

70 *Id.* at 1054.

71 *Id.* at 1070–71.

72 *Id.* at 1059.

73 *Id.* at 1060 ("In other words, under plaintiffs' approach the courts would have to decide that certain individuals' First Amendment activities are more important than those of others . . . .").

74 476 F. Supp. 561 (E.D. Mich. 1979).

75 *Id.* at 572.

III. FIRST AMENDMENT JURISPRUDENCE AND ITS APPLICATION TO THE SECTION 215 PROGRAM

A. *Introduction*

This Part discusses the existing jurisprudence concerning the First Amendment, with a focus on how courts have addressed government actions that deter people from engaging in protected activities. It begins by describing the legal test that courts apply when analyzing government actions for compliance with the First Amendment. Part III.C discusses the chilling of expressive and associative freedom that occurs when First Amendment rights are violated. Part III.D identifies three driving principles of First Amendment jurisprudence, beginning with the principle that the government generally should not target the associational activity of citizens by collecting associational information. The second principle is the prevention of government deterrence of expressive and associational activity, which is at the heart of the chilling effect. The third principle is that government activity must be effective and tailored to meet a specific goal. Part III.D also discusses how each of these principles relates to the First Amendment test and to the analysis of the chilling effect. Finally, Part III.E applies these principles to the Section 215 program, and concludes that this program violates the First Amendment.

B. *The First Amendment Test*

Courts have long recognized that government restrictions on association or speech, even those that further a legitimate government interest, can violate the First Amendment. When First Amendment concerns are implicated, courts apply a standard of review referred to as "exacting scrutiny."[76] This entails a two-part inquiry. First, the government action or program must serve a compelling (not merely legitimate[77]) government interest. Second, the scope of the disclosure must be tailored to the government interest.[78] The action or program

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76 *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 64 (1976) ("Since *NAACP v. Alabama* we have required that the subordinating interests of the State must survive exacting scrutiny.").

77 Buckley, 424 U.S. at 75; NAACP v. Button, 371 U.S. 415, 438 (1963) ("The decisions of this Court have consistently held that only a compelling state interest in the regulation of a subject within the State's constitutional power to regulate can justify limiting First Amendment freedoms.").

78 Shelton v. Tucker, 364 U.S. 479, 488 (1960) ("In a series of decisions this Court has held that, even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be

must effectively fulfill a government need "'that cannot be achieved through means significantly less restrictive of associational freedoms.'"[79] This means that a program can be struck down for being overbroad. Courts therefore balance the public's interest in civil liberty against the government's interest in carrying out the action or program, and consider the efficacy with which the action or program fulfills the government's interest.

C. The Chilling Effect

The First Amendment is based on the assumption that the exchange of ideas and the open criticism of existing power structures are positive and important values.[80] The public's First Amendment interest is measured in terms of the "chilling effect" of government actions on the exercise of the freedoms of expression and association. This refers to the power of government regulation to deter people from acting in certain ways. Of course, laws are intended to "chill" specific behaviors, such as stealing or killing. This can be understood as a "benign" chilling effect.[81] A harmful chilling effect can occur when a government action deters behavior other than the act being regulated.[82] Most commonly, and for the purposes of this Article, a chilling effect is said to occur when individuals seeking to engage in First Amendment-protected activity are deterred from doing so by government action that does not specifically target the protected activity.[83]

The chilling of First Amendment-protected speech is problematic on two levels. First, free speech is an important value in its own right: the freedom to express dissent is critical to the functioning of a dem-

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viewed in the light of less drastic means for achieving the same basic purpose."); Britt v. Superior Court, 574 P.2d 766, 768 (Cal. 1978) ("[T]he scope of the compelled disclosure must be narrowly circumscribed to avoid undue interference with private associational rights.").

79 Boy Scouts of Am. v. Dale, 530 U.S. 640, 648 (2000) (quoting Roberts v. U.S. Jaycees, 468 U.S. 609, 623 (1984)).

80 *See* Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 692 n.35 (1978) ("[I]t seems clear that current first amendment doctrine is based primarily upon a view embracing positive values of speech.").

81 These terms are drawn from Professor Schauer's work. *See id.* at 690 (defining a "benign chilling effect" as "an effect caused by the intentional regulation of speech or other activity properly subject to governmental control").

82 *Id.* at 690–91.

83 *Id.* at 692.

ocratic political system.[84] As the Supreme Court explained, free expression is "of transcendent value to all society, and not merely to those exercising their rights."[85] The right to free speech enjoys special status in the United States,[86] such that the government may even have an affirmative responsibility to encourage it.[87] The Court has often stated that the First Amendment protects speech unless the speech poses a "clear and present danger" of a substantive evil that Congress has the right to prevent, such as the overthrow of government institutions.[88] Even in the context of incitement to revolution, the Court noted in 1951, there could be a legitimate First Amendment interest in allowing the speech, if the incitement has an additional purpose or effect.[89] The Court stated that there is a public interest in ensuring freedom of speech even for those advocating armed overthrow of the government. In support, it cited the importance of criticism and change in developing a healthy society, and argued that even radical or unpleasant speech may contain important truths.

Calling freedom of expression the "well-spring of our civilization,"[90] the Court characterized that civilization as one in which official beliefs constantly yield to challenges and are replaced by new ideas.[91] In addition, the Court expressed concern over the chilling effect of government actions against people attempting to overthrow the government, stating that "[s]uppressing advocates of overthrow inevitably will also silence critics who do not advocate overthrow but fear that their criticism may be so construed."[92] The chilling of

84 *See, e.g.*, United States v. Robel, 389 U.S. 258 (1967) (holding unconstitutional a law that prohibited registered members of the Communist Party from engaging in employment in defense facilities).

85 Dombrowski v. Pfister, 380 U.S. 479, 486 (1965).

86 Kristina Ash, Note, *U.S. Reservations to the International Covenant on Civil and Political Rights: Credibility Maximization and Global Influence*, 3 NW. J. INT'L HUM. RTS. 1 (2005) (noting the United States' commitment to promoting freedom of speech around the world under the International Covenant on Civil and Political Rights, a United Nations treaty).

87 Schauer, *supra* note 80, at 691 ("Free speech is an affirmative value—we are concerned with encouraging speech almost as much with preventing its restriction by the government.") (citing Griffin v. California, 380 U.S. 609, 613-14 (1965)).

88 *See* Dennis v. United States, 341 U.S. 494 (1951) (affirming the conviction of the General Secretary of the Communist Party USA because his exercise of speech involved the creation of a plot to overthrow the government).

89 *Id.* at 549 ("It is a commonplace that there may be a grain of truth in the most uncouth doctrine, however false and repellent the balance may be.").

90 *Id.* at 550.

91 *Id.* ("The history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths.").

92 *Id.* at 549.

speech thus has direct negative implications for democratic governance and social progress. The First Amendment establishes that all systems and principles are up for debate, including fundamental questions of governmental and political systems. It embodies the assumption, "itself an orthodoxy, and the one permissible exception" to the First Amendment prohibition on orthodoxies, that the search for truth is best served by a broad and powerful guarantee of freedom of speech.[93]

The second implication of the chilling effect is more complex and difficult to measure. In addition to decreasing the engagement and debate necessary for a democracy, the chilling of dissenting speech can bring about profound changes in the way that individuals think. If freedom of speech is chilled, so freedom of thought will be curtailed. The Supreme Court referred to this when it stated, in the context of the chilling of political speech, that "[l]iberty of thought soon shrivels without freedom of expression."[94] If interpersonal communication is restricted due to the chilling effect, people will eventually lose the vocabularies of dissent and structural criticism. The result would be a "general societal loss."[95] If we could not share ideas with others—the act of which requires both freedom of expression and freedom of association—not only our speech but also our thoughts would become more restricted. This is the fundamental danger of the chilling effect.

The Supreme Court first referred to the chilling effect in the context of constitutional protections in *Wieman v. Updegraff* in 1952.[96] The Court struck down an Oklahoma law that required state officers and employees to take a "loyalty oath," which involved stating that they were not part of any organization listed by the government as "communist front" or "subversive."[97] Some teachers refused to take the oath, claiming that it violated, among other things, the due process clause of the Fourteenth Amendment. Justice Felix Frankfurter, in a concurring opinion, described the effect of the law:

> Such unwarranted inhibition upon the free spirit of teachers affects not only those who, like the appellants, are immediately before the Court. It has an unmistakable tendency to chill that free play of the spirit which all teachers ought especially to cultivate and practice; it makes for caution and timidity in their associations by potential teachers.[98]

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93 *Id.* at 550.

94 *Id.*

95 Schauer, *supra* note 80, at 693.

96 Note, *The Chilling Effect in Constitutional Law*, 69 COLUM. L. REV. 808 (1969).

97 Wieman v. Updegraff, 344 U.S. 183, 184–85 (1952).

98 *Id.* at 195 (Frankfurter, J., concurring).

In a separate concurrence, Justice Hugo Black referenced the First Amendment and its goals, stating

> [i]t seems self-evident that all speech criticizing government rulers and challenging current beliefs may be dangerous to the status quo. With full knowledge of this danger the Framers rested our First Amendment on the premise that the slightest suppression of thought, speech, press, or public assembly is still more dangerous.[99]

In subsequent cases, courts have affirmed the invidious nature of the chilling effect. Judicial recognition of this effect, and the need to prevent government actions that cause it, is the basis for the three principles outlined in Part III.D.

By 1978, the chilling effect had become "a major substantive component of [F]irst [A]mendment adjudication."[100] A line of cases found that police infiltration of activist groups was unconstitutional because it chilled the exercise of First Amendment rights.[101] In addition, courts have recognized the chilling effect in other areas of law. In labor law, for example, employer surveillance of labor organizing activity constitutes an unfair labor practice.[102] This is because such surveillance has a chilling effect on associational activity: employees are less likely to participate in union organizing if they know that their employers can learn which employees are involved.

In addition, Justice Sonia Sotomayor expressed concern about the chilling effect in her concurrence in *United States. v. Jones.* In *Jones,* the Supreme Court unanimously determined that the FBI violated the Fourth Amendment by attaching a GPS tracking device to a suspect's car and monitoring the car's movements for twenty-eight days without a warrant.[103] Though the majority opinion was based on the common law of trespass, Justice Sotomayor separately discussed First Amendment concerns.[104] She noted that the chilling effect could have a significant impact in light of modern surveillance technology, and warned that Americans may be afraid to exercise the rights of free speech and free association guaranteed by the First Amendment

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99 *Id.* at 194 (Black, J., concurring).

100 Schauer, *supra* note 80, at 685.

101 *See, e.g.*, Alliance to End Repression v. Rochford, 75 F.R.D. 435 (N. D. Ill. 1976) (finding that the plaintiffs, an activist group, did not have "an adequate remedy at law to protect them from the effects of defendants' surveillance activities").

102 29 U.S.C. § 158(a)(1); *see also Interfering with Employee Rights (Section 7 and 8(a)(1))*, NLRB, http://www.nlrb.gov/rights-we-protect/whats-law/employers/interfering-employee-rights-section-7-8a1 ("[E]mployers may not respond to a union organizing drive by threatening, interrogating, or spying on pro-union employees, or by promising benefits if they forget about the union.").

103 United States v. Jones, 132 S. Ct. 945 (2012).

104 *Id.* at 956.

because they are aware that the government can collect personal information.[105]

D. The Three Drivers of First Amendment Law

Three principles, or drivers, underlie the existing freedom of association jurisprudence. The first principle comes from the recognition that often citizens must join together in groups in order to speak effectively.[106] Therefore, the First Amendment protects citizens against the disclosure of information that reveals with whom they associate. Though this has often been expressed as a prohibition on the disclosure of an organization's membership, this expression is a feature of the mode of association that was prevalent at the time the law developed, rather than a substantive element of the law. The principle is just as applicable to the present-day collection of electronic information as it was to the collection of membership lists in the pre-computer age. The second key driver is the prevention of deterrence, which is at the heart of the chilling effect. Under this principle, the First Amendment prevents the government from deterring citizens' speech and association. Government programs that (by virtue of common sense) appear that they will deter individuals from exercising their First Amendment rights are suspect. We know that individuals are more likely to censor their behavior when they suspect that they are being monitored.[107] Because of this, mass surveillance can chill expression and association. Therefore, courts must analyze the NSA programs for consistency with the First Amendment. The third feature is scope: courts require that the intrusion be both targeted and effective, such that it furthers the government's compelling interest without infringing on rights unnecessarily. A government action or program must be tailored to meet the compelling government interest, or its overbreadth will render it unconstitutional. The vast scope of the NSA programs suggests that they may fail this aspect of the First Amendment test. With respect to the Section 215 program, the efficacy requirement is likely not met either, as the program failed to achieve the government's interest in reducing terrorist attacks. The remainder of this Subpart will discuss the three

105 *Id.*

106 *See* NAACP v. Alabama, 357 U.S. 449, 451 (1958) (deciding a matter involving all Alabama members of the National Association for the Advancement of Colored People against a judgment requiring the names and addresses of Alabama members).

107 *See generally* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 77, 172–73 (1991).

drivers in turn, and the next subpart will apply the drivers to the Section 215 program in more detail.

1. *The First Driver: The Government Cannot Target Citizens' Associative Information*

The First Amendment protects the freedom of association. This is an essential element of freedom of speech, because speech is often only effective when individuals join together.[108] Because of the chilling effect, discussed above, freedom of association requires privacy of associational membership in order to be meaningful.[109] In a line of cases beginning in 1958, the Supreme Court found that the Constitution prohibits government attempts to stifle civil society organizations, and protects these organizations against government attempts to reveal membership information.[110] In *NAACP v. Alabama*, the Court found that the freedom of NAACP members to associate would be violated if the organization were forced to disclose its membership list.[111] The Court likened compelling the release of membership lists to forcing the members to wear identifying arm-bands, citing the dangers that both requirements would cause for associative freedom.[112] In doing so, the Court recognized that targeting associative information would chill the exercise of First Amendment rights.

Since *NAACP v. Alabama*, courts have found other laws unconstitutional because of their chilling effect on activities protected by the First Amendment. In *Shelton v. Tucker*, for example, the Supreme Court struck down an Arkansas law that required teachers to disclose every group to which they had belonged in the past five years, as a condition of employment.[113] The Court found the law unconstitutional because it chilled the teachers' freedom to associate.[114] A second Arkansas case, *Bates v. City of Little Rock*, concerned a law that required organizations to disclose their membership lists, ostensibly for tax reasons. Members of the local NAACP chapter claimed that their membership was decreasing as a result of the law, and sought to avoid disclosure. The Supreme Court found that the law was not a "frontal attack" on the freedoms of speech and association.[115] In-

108 NAACP, 357 U.S. at 449.
109 *Id.* at 462.
110 *Id.* at 458–59, 463.
111 *Id.* at 460.
112 *Id.* at 462.
113 Shelton v. Tucker, 364 U.S. 479, 488 (1960).
114 *Id.*
115 Bates v. City of Little Rock, 361 U.S. 516, 523 (1960).

stead, it was unconstitutional because it "stifled" those freedoms through "more subtle government interference."[116] Again, the Court invoked the chilling effect to invalidate the targeting of associative information.

2. *The Second Driver: The First Amendment's Preventative Element*

The First Amendment prevents the government from deterring expression and association.[117] In *Bates*, discussed above, the Court was concerned that individuals might have exercised their right to association but did not do so, in part because of the government act. The NAACP chapter claimed that members were leaving the organization, and new members were deterred from joining, as a result of the Arkansas law. The Court accepted this, stating that though the "repressive effect" was partly due to private attitudes, it only came about because of the government's action. Therefore, the Court said, "the threat of substantial government encroachment upon important and traditional aspects of individual freedom is neither speculative nor remote."[118] The Court did not require that the NAACP prove a negative, and seemed to apply a commonsense understanding of the chilling effect. The Court likewise applied a "commonsense standard" in recognizing a chilling effect in *Shelton*, the case concerning teachers' freedom of association.[119] This prevention principle establishes that the government may be prohibited from taking certain actions because those actions create a chilling effect.

3. *The Third Driver: The Government Program Must Be Effective and Appropriately Targeted*

Efficacy and targetedness are related requirements, both of which must be met for a government action or program to satisfy the First Amendment. The efficacy requirement is straightforward: it dictates that a program that infringes upon civil liberties cannot be justified if it is not effective in fulfilling the government's goal. To survive First Amendment scrutiny, the government program or action in question

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116 *Id.*

117 *See* Freedman v. Maryland, 380 U.S. 51, 59 (1965) (noting that prompt judicial review of the state's denial of licenses to a theater to show a film is necessary to minimize the deterrent effect of a possible erroneous denial); *see also* Schauer, *supra* note 80, at 689 ("The very essence of a chilling effect is an act of deterrence.").

118 Bates, 361 U.S. at 524.

119 Local 1814, Int'l Longshoremen's Ass'n, AFL-CIO v. Waterfront Comm'n of N.Y. Harbor, 667 F.2d 267, 272 (2d Cir. 1981).

must serve a compelling government interest.[120] However, it is not enough for the government to demonstrated the existence of this interest: the program must also be structured so that it serves the interest.[121]

If the government has a more targeted means of fulfilling its need, it is not permitted to choose a course of action that has a broad chilling effect.[122] This suggests a balancing test in which the public's interest in preserving First Amendment freedoms, and ensuring that any intrusions on those freedoms are narrow in scope, is weighed against the government's interest in the program. Assessing the relative strength of the latter requires consideration of the program's efficacy.[123]

To grant a government demand for information about organizational membership, courts require that the government "show a substantial relation between the information sought and a subject of overriding and compelling state interest."[124] For example, in *Gibson*, the Florida government asserted an interest in determining whether Communist Party members had joined the NAACP and demanded that the Miami NAACP disclose its membership list. [125] The Court recognized a compelling government interest in obtaining information about the Communist Party, but found that the relationship between the government interest and the information sought was too tenuous to justify forcing the release of the membership list.[126]

A program can also be invalid under the First Amendment if it is overbroad. As the scope of a program increases, so does its potential to have a chilling effect, because the government collects more information that could potentially be used against citizens. For example, in *Shelton*, teachers were required to disclose "every conceivable associational tie," including relationships with religious, professional, and political organizations. This breadth intensified the chilling ef-

120 ACLU v. Ashcroft, 322 F.3d 240, 251 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004).

121 *Id.*

122 Kusper v. Pontikes, 414 U.S. 51, 58–59 (1973).

123 *See* 42 U.S.C. § 2000ee(c)(1); PCLOB SECTION 215 REPORT, *supra* note 9, at 8.

124 Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 546 (1963).

125 *Id.* at 542.

126 *Id.* at 550; *see also* Strandburg, *supra* note 1, at 347.

fect.[127] When a government program is large in scope, it is more likely to violate the First Amendment.[128]

E. The Section 215 Program Violates the First Amendment

1. Applying the First Driver: The Section 215 Program Collects Associative Information

The cases that established the presumption against government targeting of associational data were decided before citizens began to associate using digital communications technology. However, the principles that animate the associative freedom cases of the 1950s and 1960s indicate that mass electronic surveillance raises analogous First Amendment concerns.

In past decades, people necessarily exercised their First Amendment rights of expression and association very differently from the ways in which they exercise those rights today. People more often attended meetings in person, their organizations were relatively static and defined, and they had formal lists of members. While these forms of association persist, associational activity is now often carried out by technological means. Furthermore, the forms of association as well as the means have changed: technology allows for the rapid emergence of new groups and affiliations, allows people to learn about and support a cause early in its existence, and erases many obstacles to organizing.[129]

This change has implications for associational life. Part of this concerns access to information: people can communicate with others and share ideas more easily because of communications technology. But there is a psychological element as well. As one commentator wrote of the Arab Spring protests in 2010 and 2011, "[s]ocial networks have broken the psychological barrier of fear by helping many to connect and share information."[130] The perception that the use of communications technology is private has likely made people more willing to engage in associational activity than they would be if they had to physically attend, for example, a meeting of an unpopu-

127 Shelton v. Tucker, 364 U.S. 479, 486 (1960); *see also* Strandburg, *supra* note 1, at 346 (arguing that the government's request for information in *Shelton* was unconstitutional because it lacked specificity).

128 Dombrowski v. Pfister, 380 U.S. 479, 500 (1965).

129 Strandburg, *supra* note 52, at 745.

130 Saleem Kassim, *Twitter Revolution: How the Arab Spring Was Helped by Social Media*, POLICYMIC (July 3, 2012), http://mic.com/articles/10642/twitter-revolution-how-the-arab-spring-was-helped-by-social-media.

lar political group. This is particularly true because groups in which people are linked by technology can form without a set number of members, and people might join an online community when they would not join a small physical group.[131]

The means by which people associate with each other has changed dramatically because of changes in communications technology.[132] The fact that cell phones (which are often also small computers) are now ubiquitous means that people rely on them for many activities, including those protected by the First Amendment. And as the means of association has changed, so has the means of associational chill.

Digital data is the present-day analog of membership lists, except that metadata reveals even more than membership lists did in the 1950s and 1960s. Admittedly, modern metadata collection is different from the membership lists at issue in the First Amendment case law in that with respect to metadata, the associational information is connected to the individual rather than to the organization. In the context of modern communications technology, however, this is effectively the same thing. Because associational activities now take place through digital means, an individual's metadata provides all the information that membership lists provided in the past. Like associations' membership lists, phone metadata provides information about who is associating with whom, and at what time. This can reveal much about the context of the interaction. In fact, metadata may reveal more than traditional, relatively static membership lists ever could.[133] Thus, the chilling effect may be broader in the context of metadata collection than it was in the days when associative information was gleaned from organizations' membership lists. This is particularly true given the secretive nature of NSA surveillance; uncertainty about the scope of collection and means of targeting could prompt individuals to err on the side of not communicating or not associating with certain individuals or groups.[134]

Records of phone calls and text messages reveal association in many ways. For example, many meetings are now carried out via phone. In addition, even when physical meetings occur, people of-

131 Strandburg, *supra* note 52, at 751.

132 *Id.*

133 *Id.* at 752 ("Relational surveillance, even more than government investigation of membership in traditional associations, has the potential to chill not only knowing association with unpopular groups, but even the exploration of non-mainstream ideas in a social context.").

134 *Id.*

ten call or text each other before, after, or in lieu of attending the physical meeting. For example, suppose I attend meetings with the same group of people every Monday and Thursday at 8 PM. I frequently walk to the meetings with four friends who are also members. We arrange to meet a few minutes before the meeting, either through a group text message or a series of phone calls. Once we arrive at the meeting location, we have to call someone who is already inside the building to unlock the door and let us in. Metadata could reveal a significant amount of information about our group and the meeting attendees: it allows the government to map networks and activities.[135] Therefore, to collect metadata is to target associational information—which implicates the First Amendment.

2. *Applying the Second Driver: The Section 215 Program Deters the Exercise of First Amendment Rights*

Common sense suggests that the mass electronic surveillance conducted by the government implicates the First Amendment. Though there may be some situations in which it is unclear whether a government action or program raises First Amendment concerns, this is not the case with respect to the Section 215 program. This program has several characteristics that make First Amendment concerns particularly salient. First, and most important, is the sheer breadth of the program. Under the Section 215 program, a citizen's data was very likely to be obtained by the government. This means that any chilling effect is also widespread. Second, the government did not need probable cause, or even reasonable grounds, to believe that a citizen is implicated in a crime in order to obtain the individual's information under Section 215. This dramatically changes the balance of power between citizens and the government. Third, the government could investigate Americans based in part on activities that are protected by the First Amendment. Finally, the program's lack of transparency means that subjects of surveillance never knew that their data was being obtained; gag orders prohibited service providers from disclosing that they released information. In light of these features, the Section 215 program implicates the First Amendment. Other mass surveillance programs likely share these features. Courts should therefore recognize that First Amendment concerns are likely implicated in cases involving mass electronic surveillance, and should

135 Jillian York, *The Harms of Surveillance to Privacy, Expression and Association*, GLOBAL INFORMATION SOCIETY WATCH (2014), *available at* http://www.giswatch.org/sites/default/files/the_harm s_of_surveillance.pdf.

approach such cases with the presumption that they will need to analyze Fourth Amendment and First Amendment concerns separately.

Scholars have long recognized that surveillance by authorities can affect individuals' behavior. For example, in the eighteenth century, Jeremy Bentham designed the panopticon: a large tower with windows on all sides, from which a guard could see each of the inmates of a prison.[136] Though the guard could not watch all of the prisoners all of the time, the prisoners would have to assume that they were being watched at any given moment, and would thus comply with authority. Michel Foucault later explained that the effect of the panopticon is "to induce in the inmate a state of conscious and permanent visibility that assures the automatic functioning of power."[137] He also noted that the principle of the panopticon could be used to ensure obedience outside of the prison context. Mass surveillance functions like the panopticon. Just as the guard does not watch every prisoner all the time, the NSA is not actually reading through the information of every American. But, like the prisoners, Americans now have to assume that their information will be subject to government scrutiny.

In fact, the specific chilling effect of the NSA programs has already been documented. An extensive report by Human Rights Watch and the ACLU found that the surveillance has disrupted the work of journalists and lawyers, who adopt elaborate security measures to protect confidential information.[138] In addition to providing a concrete example of the chilling effect, the study raises the broader point that the chilling of the press and of the exercise of the right to legal counsel can have far-reaching implications for the rest of society. The chilling of the press, in particular, undermines our ability to learn about and respond to government actions. This is emphasized in a 2014 study, conducted by the Reporters Committee for a Free Press, which found that sources have become more reluctant to communicate with reporters as a result of government surveillance.[139] A separate study found that NSA surveillance also has a sig-

136 JEREMY BENTHAM, PANOPTICON OR, THE INSPECTION HOUSE 4 (1791).

137 FOUCAULT, *supra* note 107, at 201.

138 HUMAN RIGHTS WATCH, WITH LIBERTY TO MONITOR ALL: HOW LARGE-SCALE US SURVEILLANCE IS HARMING JOURNALISM, LAW, AND AMERICAN DEMOCRACY 3–5 (2014), *available at* https://www.hrw.org/sites/default/files/reports/usnsa0714_ForUPload_0.pdf; *see also* ACLU v. Nat'l Sec. Agency, 493 F.3d 644, 696 (6th Cir. 2007) (Gilman, J., dissenting) (discussing the chilling effect of surveillance on attorney-plaintiffs).

139 Jamie Schuman, *The NSA's Shadow: Despite Court Rulings and Reforms, Surveillance-Induced Chill Remains*, REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,

nificant chilling effect on American writers, who stated that the NSA programs have made them less likely to research or write about certain topics, and less likely to communicate with sources or other contacts in different countries.[140] As with that of reporters, the chilling of writers has broad implications for the freedom and openness of public debate. Finally, the Electronic Frontier Foundation has collected specific examples of how the Section 215 program has chilled Americans' exercise of their right to association; the affected individuals include members of religious groups, human rights workers, environmentalists, and gun rights activists.[141] Government surveillance has also had a chilling effect on the use of the Internet by Muslim-Americans.[142] These examples prove that the chilling effect, though difficult to measure, is clearly occurring as a result of NSA surveillance.

3. *Applying the Third Driver: The Section 215 Program is Ineffective and Overbroad*

The Section 215 program violates the First Amendment by virtue of its broad scope in combination with its ineffectiveness. The chilling effect, described above, and its attendant impacts on associational and expressive freedom, weighs against the constitutionality of the Section 215 program. However, a program can be upheld under the First Amendment even though it has a chilling effect if the government interest in conducting the program outweighs the public's First Amendment interest. Generally, courts recognize that national security concerns should be afforded significant weight. When a program fails to contribute meaningfully to national security, however, the program is not justified. Furthermore, a program whose scope is disproportionate to its effectiveness will likely be struck down under the First Amendment. This is the case with respect to the Section 215 program.

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http://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-winter-2014/nsas-shadow.

140 *Chilling Effects: NSA Surveillance Drives U.S. Writers to Self-Censor*, PEN AMERICAN CENTER, 17 (2013), *available at* http://www.pen.org/sites/default/files/Chilling%20Effects_PEN%20American.pdf.

141 *EFF Files 22 Firsthand Accounts of How NSA Surveillance Chilled the Right to Association*, ELECTRONIC FRONTIER FOUNDATION (Nov. 6, 2013), https://www.eff.org/press/releases/eff-files-22-firsthand-accounts-how-nsa-surveillance-chilled-right-association.

142 Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim Americans*, 7 U. M.D. L.J. RACE RELIG. GENDER & CLASS 375 (2007).

The Section 215 program failed to meet the efficacy requirement. Though the government has touted the success of the program in preventing terrorist attacks,[143] the Privacy and Civil Liberties Oversight Board (PCLOB), the executive branch agency that conducted an independent investigation into the Section 215 program, found that the program was ineffective. In fact, despite using numerous metrics to search for instances in which the program was successful, the PCLOB found that the Section 215 program did not thwart a single terrorist attack.[144] Section 215 data contributed to the identification of an unknown terror suspect in only one case. This suspect had already been the subject of an FBI investigation and was linked to other pending FBI investigations, and the decision to monitor the suspect came from the monitoring of a specific foreign number rather than from the bulk collection of records. Thus, the government could have reached the same result by asking the service providers for the individual suspect's metadata. (The suspect was charged with sending money to a terrorist group.)[145]

There is now widespread agreement that the Section 215 program was not sufficiently effective to warrant its impacts on privacy and civil liberties. The PCLOB stated this unequivocally, and recommended that the program be shut down.[146] The President's personally appointed Review Group agreed that the government should not continue to store the data.[147] Even Deputy NSA Director John Inglis appeared to indicate that it would be more effective for the agency to seek the information from phone providers on a case-by-case basis.[148]

The Section 215 program also failed to meet the requirement that a government action be appropriately targeted. The scope of Section 215 is one of its most striking characteristics. As noted, this program collected information indiscriminately. In its report on the Section

143 Dana Bash & Tom Cohen, *Officials Cite Thwarted Plots, Oversight in Defending Surveillance*, CNN (June 19, 2013, 6:38 AM), http://www.cnn.com/2013/06/18/politics/nsa-leaks/.

144 PCLOB SECTION 215 REPORT, *supra* note 9, at 148.

145 *Id.* at 152–53.

146 *Id.* at 167–68.

147 *See* RICHARD A. CLARKE ET. AL., PRESIDENT'S REVIEW GROUP ON INTELIGENCE AND COMMC'NS TECHS., LIBERTY AND SECURITY IN A CHANGING WORLD: REPORT AND RECOMMENDATIONS OF THE PRESIDENT'S REVIEW GROUP ON INTELLIGENCE AND COMMUNICATIONS TECHNOLOGIES 108 (2013), *available at* http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf. ("[T]he government should not be permitted to collect and store all mass, undigested, non-public personal information about individuals . . . .").

148 Hayes Brown, *Deputy NSA Chief Endorses Plan to Keep Phone Records in Private Sector Hands*, THINK PROGRESS (July 31, 2013, 4:19 PM), http://thinkprogress.org/security/2013/07/31/2391511/deputy-nsa-metadata/.

215 program, the PCLOB stated that "[t]he extraordinary breadth of this program creates a chilling effect on the First Amendment rights of Americans."[149] The report accepted that the government had a compelling interest in combating terrorism, but found that the Section 215 program failed to meet the tailoring requirement.[150] Given this combination of ineffectiveness and a lack of tailoring, the Section 215 program does not satisfy the First Amendment.

CONCLUSION

Part III of this Article has argued that the Section 215 program is not permitted under the First Amendment. However, as discussed in Part II, this analysis should also be applied to the NSA's other mass surveillance programs. In general, courts should consider the First Amendment, and apply the exacting scrutiny standard, in cases concerning mass electronic surveillance programs. As noted, this involves weighing the public's interest in maintaining civil liberties against the government's interest in conducting the program. With respect to programs involving Internet and phone communication, it is likely that First Amendment concerns will be implicated. However, the balance of interests may be different depending on the specific program. For this reason, the First Amendment analysis may yield different results. Therefore, courts should conduct a First Amendment analysis with respect to each program.

Mass surveillance programs impact Americans' important rights to freedom of expression and association. Courts should extend existing First Amendment case law to address these programs. While, as argued in Part III.D, the underlying principles of the existing law establish that courts should conduct an independent First Amendment analysis in mass surveillance cases, many of the older cases deal with outdated or less popular forms of associational activities. The ubiquity of cell phones, and the government's capacity to collect virtually all communications data of virtually all Americans, have altered the constitutional calculus. The chilling effect and overbreadth of the NSA programs mean that they may violate the First Amendment, and the Fourth Amendment alone does not adequately protect citizens from this violation. If the promise of the First Amendment is to mean anything, it must be interpreted to apply to mass surveillance programs.

149 PCLOB SECTION 215 REPORT, *supra* note 9 at 106.

150 *Id.*